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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 886

MARVIN DANCYGER,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW JERSEY

BRIEF FOR RESPONDENT IN OPPOSITION

BRENDAN T. BYRNE,
Deputy Attorney General of New Jersey,
Acting Prosecutor for Essex County,
Essex County Court House,
Newark 2, New Jersey.

C. WILLIAM CARUSO,
Of Counsel and on the Brief.

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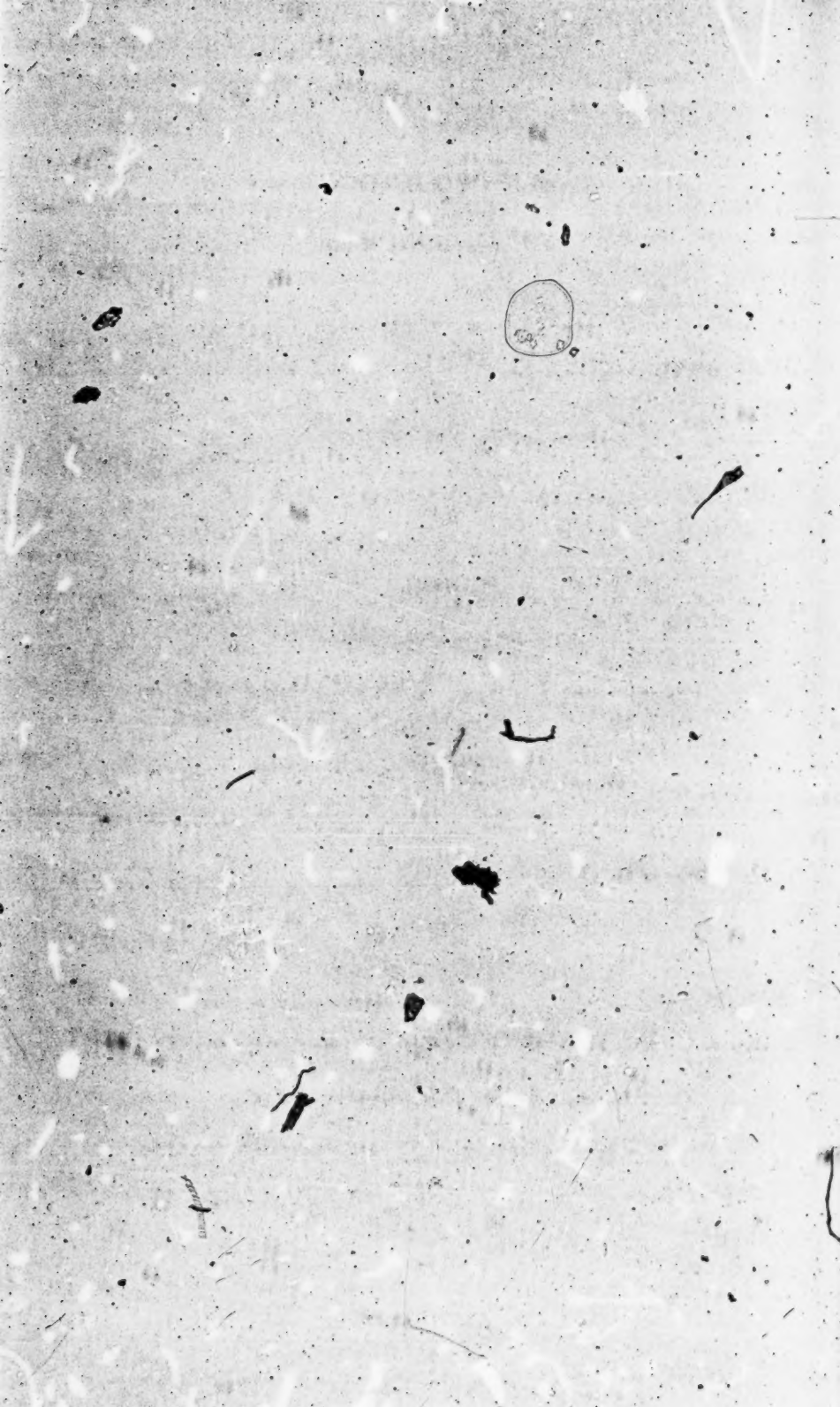

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Opinions Below

The opinion of the Supreme Court of New Jersey, the Court immediately below, reversing the judgment of the Superior Court of New Jersey, Appellate Division, is officially reported in 29 N. J. 76, 148 A. 2d 155 (Appendix A of Petition.

The majority opinion of the latter Court, and the dissenting opinion, are officially reported in 51 N. J. Super. 150, 143 A. 2d 753 (Appendix B of Petition).

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Questions Presented

1. Whether the trial court could properly comment upon petitioner's failure to take the stand at the trial and deny certain facts which circumstantially implicated him, and whether the charge, which was in strict conformity with New Jersey law, was such as to deny him his privileges and immunities and due process of law.[1]

2. Whether the prosecutor's summation on the same subject constituted a denial of petitioner's privileges and immunities and due process of law.[1]

Statement[2]

At the trial, the complaining witness, Mrs. Estelle Grossbardt, testified for the State that she spent the 1956 summer vacation period as a guest at Goldman's Hotel, in West Orange, New Jersey (P8a-11 to 15; P14a-9 to 10). She was accompanied there by her two children, aged 10 and 2, and by a "governess" (P8a-23 to 24; P17a-9 to 12). Her husband joined his family on weekends at the hotel.

During her attendance at the hotel, Mrs. Grossbardt, her children, and her husband all occupied the same room (P8a-23 to 24), while the "governess" occupied a separate room (P17a-11 to 14). Mrs. Grossbardt's room was located on the main or ground floor of the hotel (P34a-27 to 29). Access to the room was off a central corridor, which

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[1] Constitution of the United States, Amendment XIV, Section 1.

[2] References are to the printed Appendix of Respondent in the New Jersey Supreme Court.

in one direction led to the main lobby at the front of the hotel and in the other direction led to a side entrance door (just three doors beyond Mrs. Grossbardt's room) into the parking lot and ultimately to a rear entrance door into the swimming pool area (P34a-30 to 40).

Mrs. Grossbardt brought with her to the hotel some of her personal jewelry, consisting of the platinum diamond wedding ring, here involved, a charm bracelet, "cultured pearls, a wrist watch, a cultured pearl wedding band, and a pinkie ring, cultured pearl and diamonds" (P8a-38 to P9a-20). The platinum diamond ring, which cost $2,700 (P96a-38), and the charm bracelet were purchased by the Grossbardts from a firm of jewelers, one of the partners of which was the brother of Mrs. Grossbardt's husband (P96a to P98a-29).

Mrs. Grossbardt did not lock the door to her room except during the night while she was sleeping. She kept her jewelry in a jewel box on top of the dresser in her room (P9a-21 to 22; P14a-5 to 7; P18a-12 to 30). The room was kept unlocked so that the 10 year old child and the "governess" for the two year old child could have access during the day and so that the children would not be locked in while asleep at night (P17a-5 to 6; P18a-12 to 30).

Mrs. Grossbardt testified that, on Sunday evening, July 29, 1956, she wore a portion of her jewelry, including the platinum diamond ring and the charm bracelet (P9a-27 to 40). When she returned to her room in the early hours of Monday, July 30, she placed all the jewelry that she had been wearing in the jewel box on her dresser (P10a-23 to 30). She further testified that, after placing the jewelry in the jewel box, she had no further occasion to go to the box until 7 p.m. on Tuesday, July 31 (P10a-30 to 40). At that time, while dressing for dinner, she dis-

covered that her platinum diamond ring, her charm bracelet and other items of her jewelry were not in the box (P11a-5 to 20).

Mrs. Grossbardt thereupon notified the proprietors of the hotel of the disappearance of the missing jewelry, and they in turn notified the West Orange police (P11a-21 to 25; P35a-15 to 16). The local police made an investigation the same evening and, subsequently sent out teletype containing a description of the missing jewelry (P75a to P76a-7 to 12).

There was proof that the charm bracelet was pawned at a pawnshop at 1937 Broadway, New York City, on July 30, 1956, at a time estimated to be between 3:30 and 4:30 p.m. (P65a-14 to 21; P82a-29 to 32; P95a-10 to 24). Mrs. Grossbardt testified that her room was not left unoccupied until 11 a.m. or later on the morning of July 30 (P14a-29 to 40). In view of this testimony, the jewelry must have disappeared sometime after 11 a.m. and sometime before 3:30 p.m. on Monday, July 30, 1956.

The State produced evidence that, from November, 1955, right up to the time of the trial, the defendant was employed as a salesman by Charles S. Loeb Company, of New York City which company is engaged in the importing and wholesaling of pipes and smokers articles (P19a-30 to 40). The duties of the defendant were those common to any outside salesman—to call on customers and prospective customers (in this case, retailers of pipes and smoker's articles) to exhibit samples of his merchandise and to take orders and occasionally to make collections for his employer (P20a-12 to 25; P23a-20 to 21). Where a call was successful, a written order was prepared on a company order form listing the customer's name and address and the merchandise ordered, the original of which was given to the employer (P20a-30 to 40). The defend-

ant's employer did not require or keep a record of calls made by its salesmen that did not result in the placing of an order (P24a-25 to 34).

Further evidence was adduced showing that the defendant, in the course of his employment, on July 30, 1956, took orders from four different customers located in Newark and East Orange, New Jersey (Exhs. S-3, S-4, S-5 and S-6, P161a, P163a, P165a, P167a).

The State also called two witnesses, Morris White and Rae White, his wife, the proprietors of a jewelry store located at 257 Main Street, Poughkeepsie, New York. They testified that, on July 31, 1956, between noon and 1 p.m., the defendant entered their store and showed the platinum diamond ring to Mrs. White (P51a-5 to 12). He told her that he had found the ring in the street, and asked whether the ring was "glass or is it a diamond" (P51a-12 to 24). Mrs. White took the ring to her husband, who was working in a room at the rear of the store, and he, professing suspicion, instructed Mrs. White to call the local police (P54a-6 to 20).

When the police arrived at the jewelry store, they requested the defendant to accompany them "to police headquarters to be questioned" (P57a-36 to 37). The defendant accompanied the police officers to police headquarters where, in response to their questioning, he informed them that he was employed as a salesman by Charles Loeb Company and had been making calls on his customers in Poughkeepsie that morning (P58a to P59a-37). The defendant further stated that after completing a call on a customer at Main News Company, 275 Main Street (P59a-8 to 11), he crossed the street, and noticed a "shining object in the gutter" (P59a-11 to 12). After picking it up, the defendant saw the White's Jewelry store and took the ring there to determine whether or not it was of any value (P59a-12 to 15).

On August 4, the Poughkeepsie police sent out a teletype message to the West Orange police, containing a description of the ring (P59a-27 to 39). Three weeks later, on August 25, two West Orange police officers accompanied by Mrs. Grossbardt, appeared at Poughkeepsie police headquarters, at which time Mrs. Grossbardt identified the ring as belonging to her (P60a-9 to 22).

Mr. Maclyn Goldman, a member of the bar of New Jersey and one of the proprietors of Goldman's Hotel, was called as a witness by the State, as was Mr. Herbert Fine, a physical education teacher at a Brooklyn high school, who was employed at Goldman's in the summer of 1956. Mr. Goldman, when asked whether he had ever before seen the defendant, replied that he had identified a police photograph of the defendant sometime after the disappearance of the jewelry. Upon being shown the police "mug" photograph of the defendant (Exh. S-7), Mr. Goldman identified it as being a photograph of a person that he had seen a "week or two" prior to July 30, 1956, and on several occasions previous thereto, as a dinner guest at the hotel (P36a-34 to 40; P37a-10 to 12; P42a-7 to 35).

Mr. Fine testified that he had seen the defendant at the hotel "during the summer of '56," on a Saturday night between July 15 and July 30, 1956 (P86a to P88a-34 to 35)—i.e., prior to the disappearance of the jewelry on Monday, July 30.

The final witness called by the State was a handwriting expert. He testified that he had compared the handwriting on the pawn ticket with samples of the handwriting of the defendant and that they were all written by one and the same person (P103a-7 to 8).

Following the conclusion of the State's case, the defendant's wife was called as a witness on behalf of the defend-

ant. Her testimony was that, during the summer months of 1956, and particularly June and July of 1956, the defendant invariably spent Saturday evenings with her and their children (P134a to P135a-8 to 17).

The defendant himself did not take the stand.

At the conclusion of the entire case, the jury retired and deliberated for nearly four hours. The jury found the defendant guilty of the larceny count and reported that it had been unable to reach agreement on the count charging entering with intent to steal (P159a-36 to 38). The court thereupon declared a mistrial as to the latter count (P160a-13 to 15).

On December 5, 1957, petitioner moved for a new trial, and the motion was denied on January 15, 1958 (P3a to P4a).

On January 20, 1958, petitioner was sentenced to a term of 3 to 5 years in New Jersey State Prison (P2a).

On appeal to the Appellate Division of the New Jersey Superior Court, the judgment of conviction was reversed, with a dissenting opinion (Petitioner's Appendix B, pp. 30-42; pp. 42-46).

By virtue of Revised Rule 1:2-1(b) of the New Jersey Supreme Court whereby an appeal from the Appellate Division may be taken "In causes where there is a dissent in the Appellate Division of the Superior Court," the State took an appeal to the Supreme Court of New Jersey, and the latter court reversed the judgment of the Appellate Division (Petitioner's Appendix A).

On March 17, 1959, petitioner made application to this Court for a stay of execution of the judgment of conviction and sentence; on March 18, 1959; the respondent herein filed an opposition to said application; the papers were

presented to Mr. Justice BRENNAN and on the same day, March 18, 1959, petitioner's application for a stay of execution was denied by Mr. Justice BRENNAN.

On March 19, 1959, petitioner made application to the New Jersey Supreme Court for a stay of execution pending disposition of a petition to this Court for a writ of certiorari, and his application was denied.

On April 23, 1959, petitioner made application to the New Jersey Supreme Court for recall of its mandate and for a rehearing of the appeal before that court, and on April 27, 1959, the New Jersey Supreme Court denied his petition.

On April 30, 1959, this office was served with copies of the petition filed with this Court for issuance of a writ of certiorari.

ARGUMENT

The State's evidence at the trial warranted the court's comment on defendant's failure to testify; the charge as given was correct and in the language repeatedly approved by New Jersey; and defendant was not denied any constitutional rights and privileges.

At the trial, the State's evidence established certain inculpatory facts which were within defendant's personal knowledge and which he could have disproved by his own oath as a witness if the facts were not true.

But defendant chose not to take the stand in his own behalf.

For example, there was the testimony of the owner of Goldman's Hotel (Mr. Maclyn Goldman) that the defendant was present at the hotel prior to the date of the alleged theft.

There also was the testimony of the hotel's social director (Mr. Herbert Fine) that he had seen the defendant in the hotel lobby sometime after 8:00 P.M. on a Saturday evening between July 15 and July 30, 1956, prior to the date of the alleged theft.

Then there was the unimpeached testimony of the handwriting expert (Mr. J. Howard Haring) establishing the fact that defendant, under an assumed name, had pawned the charm bracelet which was part of the stolen jewelry, thereby establishing the fact that defendant was in possession of the stolen jewelry within a few hours after its disappearance.

All of these facts were inculpatory; they were within the personal knowledge of defendant; and he could have disproved them by his own oath as a witness if they were not true.

Following is the portion of the court's charge under attack (P156a-35):

> "The defendant did not take the stand himself. Well, in that connection, I will charge you as follows: The defendant is at all times presumed to be innocent and the burden of proving his innocence is not upon him. He is not required to show he is innocent, and I charge you that it is the privilege of the defendant to testify or not, as he chooses. You are not at liberty to infer guilt from his failure to give evidence. However, where facts concerning the acts of the defendant are testified to which tend to prove his guilt and he by his oath can deny them, his failure to testify in his own behalf raises a strong presumption that he cannot truthfully deny those facts.
>
> The criterion is whether there are facts in evidence concerning the acts or conduct of the defendant, with-

in his personal knowledge, which are inculpative or imputative in some degree of guilt, which fact he, by his oath, can deny."

Petitioner's contention in the New Jersey Supreme Court was that the case was not one which called for any comment at all on defendant's failure to take the stand; that if given, it should have been limited to "inculpatory" facts; and that the trial judge should have explained that the presumption of defendant's inability to deny the proven facts, instead of being a "strong presumption", was one that was "permissive only."

The State contended that the proven facts concerned the acts of defendant; that they were inculpatory and tended to prove defendant's guilt; that they were within the defendant's personal knowledge and he could have denied them under oath; and that his failure to testify gave rise to a strong presumption that defendant could not truthfully deny those facts.

We submit that the case presented the situation where a charge by the court upon defendant's failure to testify was fully warranted in accordance with New Jersey law.

And the trial court gave a charge which has been repeatedly approved by the New Jersey rule. (See *State* v. *Costa*, 11 N. J. 239, 94 A. 2d 302; *State* v. *Corby*, 28 N. J. 106, 145 A. 2d 289.)

The New Jersey Supreme Court upheld the charge, stating that the charge was warranted and that it was in conformity with the law of our State.

In his petition, petitioner also urges that the prosecutor, in his summation, should not have been permitted to make comment upon the defendant's failure to testify, stating (P10a), "This is not the case where within possible limita-

tions the court and prosecutor can comment on a defendant's criminal action refusal to testify."

In his petition, petitioner sets up the portion of the record (P6a bot. to P8a), wherein the prosecutor made brief comment upon the defendant's failure to take the stand. When the prosecutor attempted to point out some particular testimony of a State witness, he was interrupted by defense counsel and there followed some discussion between court and defense counsel on the pertinent rule, during the course of which defense counsel readily conceded (P7a), "I am fully aware of the law of the State of New Jersey, the fact that the prosecutor can comment," and (P8a), "I think that is a matter for the Court to instruct the jury."

At the conclusion of the discussion, the court advised defense counsel (P8a):

> "The Court: Well, of course I shall instruct the jury and I shall tell the jury that they are bound to take the law from the judge, not from counsel. But I think it is proper for counsel to state his understanding of the law as a preface to his argument."

We cannot perceive how the brief remarks of the prosecutor could possibly have harmed and prejudiced the defendant to the extent that his constitutional rights and privileges were violated, especially in view of the court's charge that the jury was duty-bound to accept the law from the judge and not counsel.

It is to be noted, too, that petitioner did not question, in the New Jersey Supreme Court, the propriety of the prosecutor's comments on defendant's failure to testify, his only attack being directed against the propriety and validity of the court's charge on the subject.

New Jersey is one of the few states which permit a trial court to make comment on a defendant's failure to deny inculpatory facts tending to establish his guilt. (*Wharton's Criminal Evidence*, 12th Ed., sec. 147; 8 *Wigmore, Evidence*, 3d Ed., sec. 2272.)

As the New Jersey Supreme Court aptly stated in *State* v. *Corby, supra*, p. 113 of 28 N. J.:

> "* * * the rule accords with common sense and justice. A defendant cannot be compelled to testify, but the privilege of doing so was created for the benefit and protection of the innocent. If he remains silent when he should speak, he does so by choice and that choice should reasonably be subject to comment; his failure is logically relevant as to his guilt or innocence." (Citing the concurring opinion of Mr. Justice FRANKFURTER in *Adamson* v. *California*, at 332 U. S. 61, 67 S. Ct. 1679, 91 L. Ed. 1912.)

The case of *Adamson* v. *California*, 332 U. S. 46, 67 S. Ct. 1672, 91 L. Ed. 1903, cited and quoted from by petitioner (P10a to P12a), would seem to support the respondent's contention.

There, the defendant who was convicted of 1 t-degree murder, questioned the validity of a California statute which permitted comment on defendant's failure to testify as repugnant to due process because, as he claimed, by testifying he would be subjecting himself to cross examination and thereby having his testimony impeached because of his previous criminal record. In rejecting the defendant's contention this Court stated, significantly (p. 1678 of 67 S. Ct.):

> "* * * California has prescribed a method for advising the jury in the search for truth. However sound may be the legislative conclusion that an ac-

cused should not be compelled in a criminal case to be a witness against himself, we see no reason why comment should not be made upon his silence. It seems quite natural that when a defendant has opportunity to deny or explain facts and determines not to do so, the prosecution should bring out the strength of the evidence by commenting upon defendant's failure to explain or deny it. The prosecution evidence may be of facts that may be beyond the knowledge of the accused. If so, his failure to testify would have little if any weight. But the facts may be such as are necessarily in the knowledge of the accused. In that case a failure to explain would point to an inability to explain."

The case of *Slochower* v. *Board of Higher Education of the City of New York*, 350 U. S. 551, 76 S. Ct. 637, 100 L. Ed. 692, cited and quoted from (P11a to P12a), cannot be made to apply here.

That was a case in which a college professor who had invoked the privilege against self-incrimination before a Senate investigating committee was subsequently discharged by the city from his school employment, and he attacked the constitutionality of the city charter under which his discharge was effected.

This Court held that, merely because the city employee relied upon the Fifth Amendment plea of self-incrimination to avoid answering questions before the investigating committee and his summary dismissal in the circumstances of the case constituted a violation of due process.

In that case, Slochower took the stand before the investigating committee and refused to answer a question whether he had been a Communist affiliations before 1941 and he stood upon his constitutional right against self-incrimination under the Fifth Amendment by refusing to answer the question.

Here, on the other hand, the petitioner stood accused of the crime of grand larceny, and at the trial the prosecution established inculpatory facts against him which were in his personal knowledge and which he could have denied under oath, and by his abstention from testifying the prosecutor and trial judge were amply justified in commenting upon his failure to testify, in accordance with New Jersey law; and the charge as given was in accord with the established rule of New Jersey.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

BRENDAN T. BYRNE,
Deputy Attorney General of New Jersey,
Acting Prosecutor for Essex County.

C. WILLIAM CARUSO,
Of Counsel and on the Brief.